

EXHIBIT A

REDACTED - FOR PUBLIC INSPECTION

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration)	
Between)	Case No. 72 472 E 01147 11
PROJECT CONCORD, INC.,)	
Claimant,)	PHASE 1 DECISION
vs.)	
NBCUNIVERSAL MEDIA, LLC,)	
Respondent.)	
_____)	

THIS DECISION CONTAINS INFORMATION WHICH THE PARTIES HAVE DESIGNATED HIGHLY
CONFIDENTIAL UNDER A CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER APPLICABLE TO
THIS CASE

Introduction

This arbitration arises under the online "Benchmark Condition" established in *In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Red 4238 (2011) (the "FCC Order"). Claimant Project Concord, Inc. (hereafter often referred to as "PCI") is represented in the arbitration by Jean Veeder MacHarg, Meagan T. Bachman and Monica DeSai of Patton Boggs, LLP and John M. Genga of Genga & Associates, P.C. Respondent NBC Universal Media, LLC (hereafter often referred to as "NBCU") is represented in the arbitration by David Murray, Lindsay M. Addison, Michael D. Hurwitz and Mary Claire York of Willkie Farr & Gallagher LLP. Pursuant to the FCC Order, the arbitration is being conducted in two phases, under a schedule agreed to by the parties and approved by me, with the view that both phases would be concluded and a reasoned award with findings of fact rendered within 90 days of my appointment on March 14, 2012.

A Phase 1 evidentiary hearing was held on April 24 and 25, 2012. Prior thereto, the parties exchanged documents (including exhibits to be offered in evidence), and they exchanged and submitted opening and rebuttal briefs, as well as declarations from each of their witnesses which by agreement were

offered and received as part of the witnesses' direct testimony. Each party offered testimony from two outside experts in addition to its internal witnesses. After the close of the hearing, the parties also submitted extensive closing briefs and proposed findings of fact. After carefully considering all of the oral and documentary evidence and oral and written arguments presented by the parties, I hereby render my Phase 1 Decision. Following the Phase 2 hearing, scheduled for May 30 and 31, 2012, I will issue an Arbitration Award which will incorporate and include this Phase 1 Decision.

Background Facts

In the FCC Order, the FCC approved the transfer of control over NBCU licensing assets from General Electric Company ("GE") to a joint venture between GE and Comcast Corporation ("Comcast") which would be controlled by Comcast and would acquire the broadcast, cable programming, online content, movie studio and other businesses of NBCU and some of Comcast's cable programming and online content businesses. In its Order, "[r]ecognizing the danger this transaction could present to the development of innovative online video distribution," the FCC adopted conditions "designed to guarantee *bona fide* online distributors the ability to obtain Comcast-NBCU programming in appropriate circumstances." (FCC Order at 4.) Generally, under the Benchmark Condition, if an OVD has "entered into at least one agreement for Video Programming with a Broadcast Network, Cable Programmer, Production Studio or Film Studio that is not an Affiliate of the OVD," all as defined in the Conditions, NBCU must provide Online Video Programming sought by the OVD that constitutes Comparable Programming (i.e., programming which is reasonably similar in kind and amount as the OVD obtained under its above-mentioned other agreement) unless a specified exception applies. "Film Studio" is defined, in pertinent part, as Warner Bros. Entertainment ("WB"), Fox Filmed Entertainment, Paramount Motion Pictures, Sony Pictures Entertainment, Walt Disney Motion Pictures Group.... These entities are sometimes referred to as NBCU's peers.

PCI is a startup company that has a plan, amongst perhaps other things, to distribute films/movies and television content online. [REDACTED]

end of 2012. Following some earlier discussions with NBCU dating back at least to July 2011, PCI on October 7, 2011 gave notice to NBCU of its intent to arbitrate under the Benchmark Condition based upon a license agreement it had obtained with a peer studio (the "Peer Deal"). On October 28, 2011, after the "cooling off" period required by the FCC Order, PCI timely filed a demand for arbitration with the AAA, which included its "final offer" in the form of a long form contract for carriage with exhibits captioned "Video-On-Demand And Electronic Self-Through Distribution License Agreement" ("PCI's Final Offer"). On November 2, 2011, the AAA notified NBCU of PCI's arbitration demand. On November 4, 2011, NBCU submitted to the AAA a "Final Offer on the Scope of 'Comparable Programming'" ("NBCU's Final Offer") along with a letter identifying what it considered threshold issues and requesting that the arbitration be conducted in two phases. Pursuant to a confidentiality agreement, NBCU's outside counsel was provided a copy of PCI's Final Offer prior to the submission of NBCU's Final Offer. On March 26, 2012, pursuant to a Confidentiality Agreement and Protective Order entered in this case on March 23, 2012 (the "Protective Order"), NBCU's outside counsel was provided with a copy of the Peer Deal upon which PCI is relying and which PCI designated as "Highly Confidential" under the Protective Order thereby limiting disclosure to NBCU outside counsel and outside experts. [REDACTED]

[REDACTED]

[REDACTED]

- 1 [REDACTED]
- 1 [REDACTED]
- 1 [REDACTED]
- 1 [REDACTED]

[REDACTED]

As noted above, NBCU's Final Offer is not in the form of a contract for carriage. Most notably, while there are some other differences in the programming offered by NBCU's Final Offer and that sought by PCI, the major differences arise from the fact that NBCU's Final Offer expressly excludes (i) "Films for which less than a year has elapsed since their theatrical release," citing the definition of "Video Programming" contained in the Conditions to the FCC Order, and (ii) "Online Video Programming the provision of which to PCI would constitute a breach of contract to which the applicable NBCUniversal licensor is a party," which, if proven by NBCU, is a permissible exclusion under Section VII.C.3 of the Conditions (the "Contractual Impediment Defense"). [REDACTED]

[REDACTED]

The form of NBCU's Final Offer, which is limited to proposed programming, is consistent with a procedure approved in the FCC Order. As provided in Section VII.C.2 of the Conditions:

In the case of an arbitration under the Benchmark Condition, if there is a dispute about what Comparable Programming a Qualified OVD is entitled to, the parties shall submit their final offers for the scope of Comparable Programming at the commencement of the arbitration, as provided under Section IV.A. The arbitrator shall decide which of the two offers for the scope of

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Comparable Programming most closely approximates the appropriate Comparable Programming. At the conclusion of phase 1, the parties shall submit their final offers for agreements based on the Comparable Programming chosen by the arbitrator.

Summary of Decision

In addition to whatever findings and conclusions are contained above, this Phase 1 Decision determines the following:

1. PCI is a Qualified OVD.
2. Films for which less than a year has elapsed since their theatrical release are not excluded from the definition of "Video Programming" contained in the Conditions to the FCC.
3. The scope of Comparable Programming in PCI's Final Offer more closely approximates the appropriate Comparable Programming contained in the Peer Deal than the scope of Comparable Programming contained in NBCU's Final Offer.
4. While the parties agreed (with my approval) that the evidence relating to NBCU's Contractual Impediment Defense should be presented and considered in Phase 1 notwithstanding the provision in the Conditions that Phase 1 should not be concerned with such Defense (see Sections VII.C.1 and VII.C.3), after hearing and considering the evidence, for determination purposes, I think it is best to follow the order set forth in the Conditions. Accordingly, a determination as to whether the Defense has been proven and the impact thereof will be deferred to Phase 2.
5. NBCU has requested an order requiring the indemnity provision set forth in Section IV.A.5 of the Conditions be included in the respective final offers for agreements for Phase 2. In the event that NBCU's Contractual Impediment Defense is determined in Phase 2, in whole or in part, not to have been sufficiently proven, it then also will be decided whether the requested indemnity is appropriate. Accordingly, the parties should consider including the requested indemnity provision in their respective final offers for Phase 2 on such conditional basis. I decline however to order them to do so.
6. No attorneys' fees, costs or expenses will be awarded at this time to either party based upon the other party's alleged unreasonable conduct "during the course of the arbitration," pursuant to Sections VII.B.10 and VIII.5 of the Conditions. Any party desiring an award of such attorneys' fees, costs or expenses shall submit with its Phase 2 opening brief a supporting declaration of counsel which shall include a detailed explanation of the basis for the request and a detailed showing as to how the amount requested has been calculated. Oppositions to such requests also shall be submitted in writing with the Phase 2 rebuttal briefs. There will no cross examination of counsel permitted.

My reasoning and related factual findings in making these determinations is further discussed below. All capitalized terms, unless otherwise indicated, are intended to have the same meaning as in the Conditions to the FCC Order.

- b. NBCU's contention is based only on a negative inference from the specific inclusion at the tail of the definition of "Films for which more than a year has elapsed since their theatrical release."
- c. It is indisputable that elsewhere in the language of the Conditions "Films" specifically are referred to as a category of "Video Programming". In its definition of "Comparable Programming" on page 119, the FCC states that the "following categories of Video Programming are not Comparable Programming . . . : (vii) Films are not comparable to non-Film programming." (Emphasis in original.) Thus, even though First Year Films are not mentioned specifically in the definition of "Video Programming" on page 121, the definition logically must be read as including First Year Films both because of the expansive "included but not limited to" phrase and because First Year Films constitute programming offered to viewers on a VOD, PPV or TVOD basis.
- d. Any other conclusion would appear to frustrate the intent of the Conditions.

In sum, while it is not clear to me (and neither of the parties have been able to convincingly explain) why the FCC considered it desirable to specifically mention that "Films for which more than a year has elapsed since their theatrical release" are within the definition of "Video Programming", for the reasons stated, I am persuaded that no valid basis has been shown for the exclusion from the definition of First Year Films, by silence and negative inference.

3. Scope of Comparable Programming

There appear to be two main points to NBCU's contention that PCI's Final Offer should not be determined to be the closer approximation to the appropriate Comparable Programming contained in the Benchmark or Peer Deal. One is the argument [REDACTED]

The other main NBCU point is based on its Contractual Impediment Defense, namely, that the online distribution service PCI plans to offer allegedly [REDACTED] to which NBCU cannot provide licensing of the scope sought by NBCU without being in breach or potential breach of numerous third party agreements. This second point will be discussed more fully in the next section of this Decision. (The FCC, in providing in the Conditions that the scope of Comparable Programming was a Phase 1 issue and any Contractual Impediment Defense should be decided in Phase 2, obviously concluded that a decision on Comparable Programming was not dependent upon a decision on any Contractual Impediment Defense.)

With respect to the first of NBCU's two main points, as I previously noted, there definitely are some differences between the Peer Deal and PCI's Final Offer to NBCU. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

NBCU's counsel in his opening statement made the following pertinent comment:

MR. MURRAY: Your Honor, my client is not trying to avoid a deal. They really are not, despite what Ms. MacHarg said. [REDACTED]

[REDACTED] don't put up content that [REDACTED] is going to object to because [REDACTED] then there would be no reason for the next three days. [REDACTED] (Transcript at 53.)

[REDACTED]

[REDACTED]

The above position was raised again by NBCU's counsel twice in his closing statement. NBCU's counsel, in substance, at pages 567-568 of the Transcript, in response to a question from me, stated that if his client was offered [REDACTED] irrespective of what those third-party agreements say, "I think we get a lot closer to a deal" but he would need to show his client the Peer Deal. In addition, at page 571 of the Transcript, NBCU's counsel made the following further statement:

MR. MURRAY: And again, Your Honor, we understand that under this condition, if a peer does a deal, we have to do a deal. And we have always intended to do a deal. The question is, what is the deal that we're supposed to match. And until we saw that deal, there was no way to know. And we believe, and I think the evidence plainly shows, that there are differences between the final offer that we got from Project Concord and [REDACTED] And if we have [REDACTED] it's a different story. We didn't have that the first time around.

[REDACTED]
[REDACTED]
[REDACTED] I think the "rights issue" may be more relevant to, and resolvable in, the Phase 2 process as an economic issue. Further, I am not at all persuaded by PCI's purported explanation as to why it opted to do what it did (even assuming PCI is justified in its doubt about NBCU's trustworthiness). Thus, if I had the discretion, I would mandate that [REDACTED] and this case essentially "might" be over without any need to resolve the difficult issues raised in NBCU's Contractual Impediment Defense, discussed below, or to address or further address any other Phase 2 matters. Nonetheless, under the applicable "baseball arbitration" procedures, I do not have such discretion. My job here is only to choose which of the competing Phase 1 Final Offers more closely approximates the appropriate Comparable Programming contained in the Benchmark or Peer Deal. Under any comparison of the scope of programming in the competing Final Offers against the Benchmark or Peer Deal, the PCI Final Offer must be found to be closer to the Peer Deal than the NBCU Final Offer. Therefore, I so find.

4. NBCU's Contractual Impediment Defense

PCI vigorously maintains [REDACTED]
[REDACTED] Indeed, PCI is so certain of its position, it has proposed a Finding (No. 130) that NBCU's Contractual Impediment Defense is "so lacking in merit to be unreasonable and vexatious" warranting an assessment of attorneys' fees against NBCU for asserting the Defense. NBCU, on the other hand, just as forcefully maintains [REDACTED] which would put NBCU at risk of breach under its third party agreements, if NBCU is required to consummate an agreement with PCI to license the Current Movie and TV Titles requested in PCI's Final Offer. I find this to be a close and difficult issue, for the reasons discussed below.

[REDACTED]

[REDACTED]

Additional details on how the PCI service, [REDACTED], is expected to function is contained in the testimony of PCI executives Sharon Peyer and Lawrence Smith.

NBCU argues that while PCI [REDACTED]

[REDACTED] (See Madoff Report, para. 35.) PCI's pending patent application entitled "Method And System For Processing On-Line Transactions Involving A Content Owner, An Advertiser, And A Targeted Owner" (Exh. 63) further provides evidence of [REDACTED]

That application very explicitly purports to patent "a system and method of enabling, over a distributed, networked computer system, negotiated transactions between an information content owner, an advertiser, and a consumer, in which the consumer can earn electronic credit for viewing targeted advertisements delivered by the advertiser and use the earned credit to access information content from the information content owner." (Exh. 63 at 9.) According to NBCU, this patent application refers to [REDACTED]

As guidance to the parties, set forth below is some of my current preliminary thinking on the Contractual Impediment Defense:

1. NBCU has the burden of proof to show by a preponderance of the evidence that the certain of the programming set forth in PCI's Final Offer, [REDACTED] would put NBCU in breach of each of the numerous third party agreements which NBCU put in evidence. The issue necessarily involves a degree of speculation when, as here, the PCI service has not yet launched [REDACTED]
[REDACTED] In addition, while I think that under the circumstances, in order to establish the Defense, it should be sufficient for NBCU to show that, as its two experts have opined, it is at risk of being in breach, that is a question which should be addressed definitively.
2. From my review [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Accordingly, upon a contract by contract analysis, the parties could end up with a result that a breach has been proven under some contracts but not under others. Such a result may not be in the interests of either party.
3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
4. [REDACTED]
[REDACTED]
[REDACTED] my current thinking is that PCI may have the better position
[REDACTED]
[REDACTED] But again, the ultimate conclusion may vary depending upon the particular language in each contract.

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If need be, of course, I will decide all of the issues pertinent to the Defense. But I think it is best that I do so after the parties have exchanged their Phase 2 final offers for agreements and I have had an opportunity to review them and the parties' related evidence and arguments. This is the order of decision-making the Conditions contemplated, and it is the order that I now wish to follow.

5. NBCU's Indemnity Request

See Paragraph 5 of the Summary of Decision above.

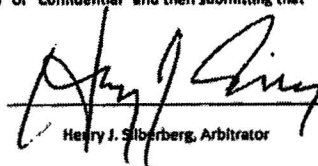
6. Requests for Attorneys' Fees, Costs and Expenses

PCI has requested an assessment of costs and expenses, including attorneys' fees, pursuant to Section VIII.5 of the Conditions. NBCU has objected, contending that PCI's request is "unfounded" and that if any party is entitled to such an assessment it should be NBCU. As stated in the Summary of Decision above, no attorneys' fees, costs or expenses will be assessed against any party at this time and this subject will be considered and determined during Phase 2 upon submission of any supporting declaration(s) pursuant to paragraph 6 of the Summary of Decision.

7. Confidentiality

As noted on the front page of this Decision, it contains information which the parties have designated as "Highly Confidential" under the Protective Order. This Decision also may contain information which has been designated as "Confidential". As suggested and agreed by counsel for the parties, they shall meet and confer with the view of reaching agreement on creating a version of this Decision which redacts all information designated by them as "Highly Confidential" or "Confidential" and then submitting that version to me.

Dated: May 10, 2012

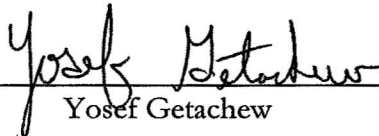


Henry J. Silberberg, Arbitrator

CERTIFICATE OF SERVICE

I, Yosef Getachew, certify that, on this 11th of July, 2012, a copy of the foregoing Arbitrator decision has been served first-class mail, postage pre-paid, on the following:

Sarah Whitesell Federal Communications Commission 445 12 th Street, SW Washington, D.C. 20554	Steven Broeckaert Federal Communications Commission 445 12 th Street, SW Washington, D.C. 20554
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Yosef Getachew